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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 135

FREDERICK WALZ,
Appellant

v.

TAX COMMISSION OF THE CITY OF NEW YORK,
Appellee

On Appeal from the Court of Appeals
of the State of New York

BRIEF AMICI CURIAE
of the
SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS
(THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA)

INTEREST OF THE *AMICI*

The Synagogue Council of America is a national coordinating body whose constituents include the national organizations representing the three branches of American Jewish religious life, Orthodox, Conservative and Reform. It is composed of six such organizations, as follows:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The Synagogue Council of America and each of its constituents are membership organizations. Congregational members of the constituents of Synagogue Council of America own property throughout the United States, including property within the State and City of New York, which is tax exempt because it is used for religious purposes. Rabbinical constituents of Synagogue Council of America are also concerned with the status of tax exemption for the property of congregations which they serve.

The concern of these *Amici* is not limited to the possible adverse financial effect that a decision invalidating tax exemption might have on its members who own such exempt property. These *Amici* also have a public and civic interest in the questions raised by this case.

Therefore, each of these *Amici* have studied and acted upon questions involving religion and the First Amendment for decades. And, where appropriate, these *Amici* have filed briefs *amicus curiae* in other cases related to such questions in state and federal courts, including the Supreme Court of the United States.

Even if the tax exemption in question is sustained, these *Amici* would not want the rationale of such a decision to weaken or impair constitutional rights or civil liberties in general, or the free exercise of religion or church-state separation in particular.

As a minority ethnic and religious group in the United States, the American Jewish community, including these *Amici*, has long felt that its ultimate security and protection resides in the extension of the widest possible protection of the civil and constitutional rights and liberties of all peoples and groups.

Beyond that, these *Amici* have concern as a matter of Judaism and religious conscience, that the reciprocal relationships of government and all religious bodies enable government and religion to coexist in an environment of freedom. This requires that religion and government be free of unconstitutional coercion or manipulation of one by the other.

In particular, these *Amici*, representing the religious groups of the American Jewish community, would be distressed by a finding in this case that held that the exemption of their property used for religious purposes was hurtful of desirable constitutional and social ends. In fact, we believe that such exemptions, properly viewed, are a positive contribution to vigorous civil and religious liberty, and should be sustained as such.

To urge this position, we have sought and obtained consent of the parties to the submission of this brief *amici curiae*.

STATEMENT OF THE CASE

Appellant's complaint alleges that he is a real property taxpayer in New York City. While Appellant describes himself as "a religious person not a member of any religious organization" (Jurisdictional Statement, P.3), he objects to the tax exemption of real property used exclusively for religious purposes, owned by religious organizations as violative of the First and Fourteenth Amendments of the Federal Constitution. Appellee's cross-motion for summary judgment dismissing the complaint was granted by the Supreme Court Special Term and affirmed in the Appellate Division and in the Court of Appeals. The case is before this Court as a result of an order noting probable jurisdiction upon application by the Appellant to reverse the decision of the New York courts and adjudge the exemptions in question as unconstitutional.

The statutory provisions in question are the following:

> New York State Constitution, Art. 16, Sect. 1:
>
> Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.
>
> Real Property Tax Law of N.Y., Sect. 420, subd. 1:
>
> Real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.

The decision below makes the point that, in finding favorably to the Appellees, the Court has sustained the exemption in question; has found that the statutes in question do not violate the First and Fourteenth Amendments of the Federal Constitution; and that "though the procedure used is technically infirm, decision is on the merits."

QUESTIONS PRESENTED

1. Do the statute and state constitutional provision in question violate the First and Fourteenth Amendments of the United States Constitution?

2. What is the constitutional character of the exemption in question?

   a. Un unconstitutional subsidy and establishment of religion?

   b. Within the discretion of the legislature to grant or deny?

   c. Declarative of a constitutional right of religious associations to hold property used for religious purposes free of ordinary taxation, in furtherance of religious liberty, separation of church and state and the free exercise of religion, guaranteed under the First and Fourteenth Amendments of the United States Constitution?

SUMMARY OF ARGUMENT

Not only is tax exemption of religious property not unconstitutional because of the First Amendment, but that very mandate requires such exemption within certain essential limits.

Viewed as a constitutional right rather than as an unconstitutional subsidy, tax exemption is a functional

recognition of church-state separation and the free exercise of religion.

As to separation, limited tax exemption is the reciprocal counterpart of the prohibition against the use of taxes to establish or support religion.

As to free exercise, the elimination of tax exemption of religious property would unconstitutionally abridge affirmative constitutional rights of religious freedom of persons and associations.

Therefore, the statute and state constitutional provision which the Appellant assails because of the First Amendment is, in fact, constitutional because of the First Amendment. For all practical purposes, state law should be upheld as declarative of the federal constitutional rights of associations and corporations which use certain property for religious purposes.

ARGUMENT

I.

A BILATERAL SEPARATION OF CHURCH AND STATE CONSTITUTIONALLY FORBIDS ORDINARY TAXATION UPON RELIGIOUS ACTIVITY OR PROPERTY IN RETURN FOR A RECIPROCAL PROHIBITION AGAINST GRANTS OF PUBLIC FUNDS ON BEHALF OF RELIGIOUS ACTIVITY OR PROPERTY.

Separation of church and state is an old doctrine which describes the permitted and prohibited constitutional relationship between religion and government. It is not a phrase which is found expressly written in the Constitution, but it is much more than a rhetorical expression as it has been applied and developed by the United States Supreme Court. Certain principles in its applica-

tion are, by now, clearly recognized: that the prohibition of religious establishment prohibits the establishment of religion in general, and is not solely directed to the prohibition of an established state church as such institutions were known in Europe, *Everson v. Board of Education,* 330 U.S. 1, 31-32 (1947); that church-state separation is not merely a functional aid to free exercise of religion, but is a principle of equal significance, *Engel v. Vitale,* 370 U.S. 421, 425 (1962); that church-state separation and free exercise, together constituting the constitutional system for guaranteeing religious liberty, are applicable to and incumbent commands on the state as well as the federal government, by virtue of the Fourteenth Amendment, *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), *McCollum v. Board of Education,* 333 U.S. 203, 210-211 (1948); that religious liberty, including separation and free exercise, is designed to achieve a position for church and state which is independent of restraint, dominion, or subservience of one to the other, in the best interest of both, *Engel v. Vitale, supra* at 431 where the Court stated: "the first and most immediate purpose of the [Establishment Clause] rested on a belief that a union of government and religion tends to destroy government and degrade religion."

In *McCollum v. Board of Education, supra,* the concurring opinion of Justice Frankfurter described this as follows:

> Separation means separation, not something less. Jefferson's metaphor in describing the relation bebetween church and state speaks of a "wall of separation" not of a fine line easily overstepped . . . "the great American principle of eternal separa-

> tion"—Elihu Root's phrase bears repetition—is one of the vital reliances of our constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.
>
> We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between state and religion is best for the state and best for religion." . . . If nowhere else, in the relation between church and state "good fences make good neighbors" . . . [citing *Everson*].

Decisions of the Court variously finding in favor of or against one or another religious practice or religious relationship between state and church always, since 1947, have reaffirmed this principle of the value of church-state separation to each side of the relationship. In *Engel v. Vitale, supra,* the Court said that its finding requiring the elimination of a prayer in the public schools does not "indicate a hostility toward religion. . . . the First Amendment was not written to destroy either religion or government."

Government, representing the taxing power in our society, stands at a peculiar distance from religion, that makes this relationship much different from the relationship that government has with other segments or elements in society. For example, government can aid or support many types of social or educational institutions which have a public purpose with the use of tax money, but "*no tax in any amount, large or small, can be levied to support any religious activities or institutions* . . .", *Everson v. Board of Education, supra* (emphasis supplied).

The reason for the prohibition was the separation of church and state. Everything in the history of that doctrine indicates that it is bilateral. Therefore, it should inevitably follow that no tax can be constitutionally levied by a state or subdivision upon religious property or activity to support government—that the taxing power cannot constitutionally extend to that peculiar sector or activity of society which is generally prohibited from receiving aid or grants from tax funds. In effect, these *Amici* contend that if the statute (New York Real Property Tax Law, Sect. 420, subd. 1) or the state constitutional provision that are in question here (New York State Constitution, Article 16, Sect. 1) were repealed or annulled, the First Amendment of the U.S. Constitution would nevertheless require New York to desist from taxation of property used for religious purposes.

Church-state separation and free exercise command neutrality on the part of government where religion is concerned. *Engel v. Vitale, supra*; *Abington School District v. Schempp,* 374 U.S. 203 (1963). Government must avoid "involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert v. Verner,* 374 U.S. 398 (1963).

II.

THE TAXATION OF PROPERTY USED FOR RELIGIOUS PURPOSES WOULD UNCONSTITUTIONALLY ABRIDGE THE FREE EXERCISE OF RELIGION

The power to tax has always been recognized as the power to control. Originally, in our history, it was thought of as the power to destroy. This doctrine was amended by Justice Holmes when he said that "the power to tax is not the power to destroy while this

Court sits," *Panhandle Oil Company v. Knox*, 277 U.S. 218, 223. But the potential controlling power of taxation in the hands of government is still a significant factor in consideration of religious liberty. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Magnano Co. v. Hamilton*, 292 U.S. 40.

Murdock involved the right of the State to levy a substantial tax upon the right of an itinerant colporteur of religious literature and evangelism to sell his wares. That case held that such a sale was a protected activity under the First Amendment, and could not be taxed. There is dicta in the case to the effect that a non-discriminatory property tax laid against all property owners would be valid if assessed and collected against houses of worship. However, since 1943, there have been many subsequent cases involving religious liberty that have been decided by the Supreme Court. *Sherbert v. Verner, supra; Torcaso v. Watkins*, 367 U.S. 488 (1961); *Speiser v. Randall*, 357 U.S. 513 (1958); *Follett v. McCormick*, 321 U.S. 573 (1944); *Douglas v. City of Jeanette*, 130 F.2d 652 (3d Cir. 1942), affd. 319 U.S. 157 (1943).

The rationale of the *Murdock* case and those that follow indicate that the Court today should be much more sensitive to an interference with free exercise as would be represented by a tax on property used for religious purposes than it might have been when it hypothetically commented on the question more than twenty-six years ago. Yet, even then, in the *Murdock* case where the Court indicated that a non-discriminatory property tax on a conventional house of worship would be constitutional, the Court said:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.

Murdock is often cited for the proposition that government can tax the preacher and the church, but not the right to preach or the right to religious exercise. These *Amici* contend that property used for religious purposes, including the house of worship, the religious sanctuary, and all that is contained therein are so intimately connected with religious exercise that to levy a direct tax upon the value of such property would constitute a tax on the exercise of religion, having the same effect as that tax upon the itinerant evangelist which the Court found unconstitutional in *Murdock*.

Associations of people, collected together for the expression in speech and action of protected rights under the First Amendment, are entitled to the protection of the First Amendment to the same extent as the individual members, acting alone, would be. *NAACP v. Alabama*, 357 U.S. 449 (1958). Thus, a church as a collective or corporate entity is entitled to the same protections of the free exercise of worship as individuals are.

What is the religious significance of a building or personal property used in religious exercise? This is a theological question which varies according to differences in religion, sect, and denomination, but the Court cannot ignore the fact that the exercise of much religious activity invests certain religious property itself with a particular religious sanctity, beyond and apart from its struc-

tural convenience.[1] The power of the state to tax such structures would represent a potentially devastating interference with their continued existence and the exercise of religion which takes place within their walls. "For there can be no doubt that the financial burden thus imposed would seriously curtail religious worship by many groups, to the point even of jeopardizing the existence of many churches." 49 *Colum. L. Rev.* 969, 989. See also 3 *Rutgers L. Rev.* 115, 123.

In a very practical way, any action of the legislature toward religiously used property except exemption would make religion an object of legislation and create various and sundry impacts and entanglements of church and state with the affairs of each other. The political arena would contain the potentialities for sale of church property by the government, discrimination between and among churches by the government, decisions by govern-

---

[1]The idea of a house of worship as a sanctified place might stem from the minutely detailed specifications for the construction of the ancient tabernacle described in the Book of Exodus, which served as a place of worship for the ancient Israelites in the wilderness and in Palestine before the construction of the Temple in Jerusalem. This ancient tabernacle is something in the form of a tent, which could be dismantled and moved from place to place as the people moved on. Nevertheless, it furnished the basic institution of worship, and permanent structures were a later development in Judaism, Christianity, and other faiths. In place, either as permanent or temporary structures, they are a part of religious exercise and not merely the place in which it occurs. Just as surely as the legislature cannot reach into the inside pocket of an itinerant colporteur, because that pocket and its contents represent religious exercise to him, so must the legislature be foreclosed from ever reaching into the house of worship, which is an essential ingredient in the exercise of religious activity more conventionally expressed.

ment based on religious rather than public considerations, and impairment of religious activity for inability of the church to meet financial obligations imposed by the government rather than those contracted by the church itself. The house of worship considered as an ordinary property taxpayer would be the indirect object of all legislation involving public expenditure and taxation levied in support of it. James Madison, in his *Memorial and Remonstrance against Religious Assessments,* deals with the danger to religious liberty where the legislature attempts to exact collection of taxes for the support of religion. However, his theory of the relationship between church and the legislature is equally applicable to the problem in this instant case.

> Because if religion be exempt from the authority of the society at large, still less can it be subject to that of the legislative body. The latter are but the creatures and vice regents of the former. Their jurisdiction is both derivative and limited; it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of free government requires not merely that the metes and bounds which separate each department of power may invariably be maintained; but more especially that neither of them be suffered to overleap the great barrier which defends the rights of the people.

It may be argued that fears of discrimination and abridgment of religious liberty are anticipatory of the effect of taxation upon protected religious activities under the First Amendment, which the Courts should not be called upon to deal with until they actually occur. However, in *NAACP v. Alabama, supra,* the Court recognized that a threatened or potential invasion of First

Amendment protection can be stopped before it actually occurs, even where the State does not intend that any unlawful abridgment will occur, because such invasions "may inevitably flow from varied forms of governmental action." Citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court said:

> The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.

III.

BY VIRTUE OF SEPARATION OF CHURCH AND STATE AND CONSTITUTIONALLY PROTECTED FREE EXERCISE OF RELIGION, PROPERTY USED FOR RELIGIOUS PURPOSES IS GENERALLY IMMUNE FROM THE TAXING POWER OF THE STATE.

The prohibition that these *Amici* urge against taxation of religious property is somewhat analogous in effect to the restraints on the taxing power that exists between the governments of our respective states and of the United States, as expressed in the United States Constition. However, the immunities are not of the same origin. The intergovernmental immunities exist in express language in the Constitution itself. The virtual immunity that these *Amici* urge in the instant case is the inevitable and proper consequence of decisions of the United States Supreme Court which withdraw religious activity from "the sphere of legitimate legislative concern and competence . . ." *McGowan v. Maryland*, 336 U.S. 420 (1961).

What are some of the boundaries of this virtual immunity from property taxes beyond legislative discretion which are claimed for religious property?

(a) The state may tax, or the legislature in its political discretion may exempt, property owned by religious institutions but not used for religious purposes. The right to tax or to exempt such institutions as hospitals, schools, social welfare agencies, homes for the aged, and other institutions and activities of civic and charitable purpose, lies in the legislative discretion, whether or not such institutions are operated by religious or secular organizations. *Asylem v. New Orleans*, 105 U.S. 362, 368 (1881); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 696, 315 P2d 394, 409 (1957); *Millivard v. Paschen*, 16 Ill. 2d 302, 309, 157 N.E.2d 1, 5 (1959).

(b) If a religious institution owns property which it someday intends to put into use for religious purposes, but has not yet done so, such property *can* be subject to taxation, since taxation of such property does not interfere with religious exercise, if the legislature chooses to do so.

(c) The state may tax property used in non-related business activities of a commercial nature, even if such non-related commercial property is owned by a religious institution, since the immunity extends only to property used for religious purposes, and not to commercial property.

(d) Where the state constructs improvements, betterments, utilities, etc. that directly touch or benefit the property used for religious purposes and enhance the

value of the property on which it stands, the state can charge the church with the cost of construction or maintenance of such improvements, betterments, or utilities. Thus, the state can charge for streets, paving, water, sewer, and other appurtenances which it furnishes directly to a house of worship, which is a far different thing from taxing the house of worship to furnish general revenue for the overall cost of government. This is analogous to a permit fee or license fee which can be validly charged for the exercise of a protected religious activity where the fee has some relation to the direct cost which government incurs by virtue of the activity being carried on. On the other hand, government may not impose a fee on such a protected religious activity for the general purpose of collecting revenue. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

Each of the foregoing areas are examples of the fact that these *Amici* are not claiming the broadest possible immunity for religious property. In each example, the legislature has constitutional discretion to tax or exempt religious organizations, so long as it exercises that discretion according to constitutional standards. It could not discriminate, in enacting taxes or exemption from taxes, between secular and religious groups where the property in question is used for a similar purpose. Thus, if non-profit hospitals are the issue, those owned by religious groups must be taxed or exempted in common with other non-profit hospitals. Nor could it discriminate between one religion and another. But within those limits of equal protection, the legislature has an area of discretion in collateral matters in this field, which, your *Amici* contend, it does not have where taxes on religious exercise or property used therefor are involved.

Many enterprises engaged in activities protected by the First Amendment are ordinary commercial businesses. Newspapers, television and radio stations, publishers, and others are in businesses which are producing and disseminating constitutionally protected material. The law is clear that no special tax can be levied on publications, but their owners are nevertheless liable for all ordinary and general taxes on a non-discriminatory basis paid by other businesses on their income or property. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

In *Baltimore v. A. S. Abell Company*, 218 Md. 273 (1958), a tax on advertising receipts of newspapers and broadcasting stations was invalidated as violative of the First Amendment, on the basis that taxing advertising touches the freedom of the press too closely. On the other hand, newspapers are required to comply with government regulations in the area of fair labor standards. *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186 (1946). Thus, it appears that taxes and other governmental regulations may be applied to a business engaged in a protected activity, but not to areas too near to the actual protected activity itself.

To the extent that a general non-discriminatory property tax is levied on property of religious institutions (except if it is exempted for some reason unrelated to religion), this same principle would apply. Rental properties, commercial businesses, land held for speculation or future use could be taxed constitutionally if the legislature chose to do so. Religious ownership or operation certainly does not, *ipso facto*, immunize them from taxation. But there is a distinction between religious activities and an ordinary commercial enterprise. In

Murdock v. Pennsylvania, supra, at P.115 (1943), the Court said:

> The fact that the ordinance is "non-discriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position . . . but the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights . . . are not to be gauged by standards governing retailers or wholesalers of books . . . it is plain that a religious organization needs funds to remain a going concern . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.

Just as a newspaper business is immune from a tax on the protected aspects of its commercial activity at the same time that it is subjected to general business taxes, so also can a religious institution be subjected to general property taxes on any property which it owns, *except that property intrinsically and directly related to the exercise of religion itself.* This is the basis for the analogy between the church or synagogue and the license tax on the sales made by the itinerant evangelist. This is the basis for the analogy between the protection af-

forded to property used for religious purposes and the protection from a specific advertising tax which the Court of Appeals of Maryland held to be unconstitutional in *Baltimore v. A. S. Abell Company, supra.*

To subject houses of worship to taxation on their property would be a serious invasion of their ability and, indeed, their right to exercise religious activity. It is not enough to say that we need not worry—that our synagogues and churches will not be taxed because state legislatures have decided not to do so. Implicit in that position is their right to change their mind someday. So long as exemption is discretionary, there is some plausibility in the argument of the Appellant that this represents an affirmative legislative decision that amounts to a subsidy. If our exemption is viewed in this light, it is called very seriously into question. Meanwhile, the area of valid legislative concern with religion has become very limited indeed and is increasingly becoming narrower. Legislative discretion can no longer justify the release of school children for religious instruction in churches during school hours. *McCollum v. Board of Education*, 333 U.S. 203. Nor can it afford a basis for allowing religious exercises in the public schools. *Engel v. Vitale*, 370 U.S. 421; *Abington School District v. Schempp*, 374 U.S. 203. Nor can it be the basis for a religious test for the office of a notary public. *Torcaso v. Watkins*, 367 U.S. 488. It can still afford a basis for laws requiring the closing of certain businesses on Sunday, but only because the Court has found that these laws are no longer religious in character. *McGowan v. Maryland*, 336 U.S. 420. In all of these cases, and in the language of a number of others, discretionary government action

in support of religious activity or religious standards has been proscribed as a religious establishment, and these *Amici* think that it has been properly proscribed as such.

It is in that other line of cases, dealing with free exercise, that this Court should find the rationale for continuing the exemption of houses of worship from taxation. There is much to fear, both as to the ultimate outcome of this case in particular and as to the potential for mischief with religious liberty in general, if this Court decides that the legislature or a state constitution *may* exempt property used for religious purposes from taxation. The rights and liberties of all will be far more secure if this Court decides, in effect, that the very First Amendment which the Appellant has invoked to assail the exemption affords the surest basis for sustaining it. The exemption of the religious sanctuary is not any longer a legislative option; it has become a Constitutional mandate.

CONCLUSION

For the reasons set forth herein, the *Amici* urge that the judgment of the New York Court of Appeals be affirmed.

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